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In the

Supreme Court of the United States

October Term, 1993

KEY TRONIC CORPORATION,
Petitioner,

v.

UNITED STATES, ET AL.,
Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED

Whether under the federal Superfund statute, a private party may recover attorneys' fees as response costs when fees are incurred to (a) prepare and negotiate a reasonable scope of work and consent decree related to cleanup of contaminated property; (b) search for and identify other parties responsible for the contamination; and (c) litigate cost-recovery actions against other responsible parties to compel their participation in the remediation.

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I. SUMMARY OF ARGUMENT

Key Tronic Corporation's ("Key Tronic") argument is straightforward. In 1986, Congress enacted the Superfund Amendments and Reauthorization Act ("SARA") to amend the 1980 Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* Through the SARA amendment to 42 U.S.C. § 9601(25) ("Section 101(25)"), a definitional section of general application, Congress explicitly authorized all persons entitled to recover costs of "response" under 42 U.S.C. § 9607(a) ("Section 107(a)") to recover costs of their "enforcement activities." That definitional section plainly applies to Key Tronic's action to recover its "response" costs from the Air Force under Section 107(a). The amended language of Section 101(25) manifests Congress' intent that attorneys' fees be awarded as costs of "response." That intent must control. Because the United States fails to show that application of the plain meaning of the statute produces a result demonstrably at odds with Congress' intent, the Court should apply the statute's plain meaning and reverse the judgment of the Ninth Circuit.

II. ARGUMENT

A. THE CERCLA STATUTE

CERCLA provides an express right of action to any person who has incurred costs to clean up a hazardous waste site to recover those costs from any other person liable under CERCLA. Section 107(a)(4)(A) and (B) provide:

> Covered persons . . . shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a

> State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan.

42 U.S.C. § 9607(a)(4)(A), (B).

CERCLA defines "response" as follows:

> The terms "respond" or "response" means [sic] remove, removal, remedy, and remedial action, *all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.*

42 U.S.C. § 9601(25) (emphasis added). The emphasized language was added by the 1986 SARA amendments. Thus, the definition of "response" in Section 101(25), as amended by SARA, plainly applies to actions brought to recover "necessary costs of *response*" under Section 107(a)(4)(B) (emphasis added).

B. "ENFORCEMENT ACTIVITIES" MEANS ATTORNEYS' FEES.

The United States offers no meaning of "enforcement activities" that does not encompass attorneys' fees. Respondent's Brief at 12 (emphasis added) states:

> Contrary to the suggestion of petitioner's amicus, the term "enforcement activities" in CERCLA Section 101(25) does not refer *only* to attorney fees, much less imply that *all* attorney fees are recoverable. For example, environmental regulators engaged in

> enforcement activity might incur substantial fees to third-party professionals (other than attorneys) for technical services . . . The term "enforcement activities" was added to the statute in 1986 to clarify that the government can recover its enforcement costs, not to establish a *general* right for prevailing parties in all CERCLA contexts.

The United States here reveals what it is unwilling to state plainly: Congress intended "enforcement activities" to encompass attorneys' fees.[1]

The only meaning, in *addition* to attorneys' fees, offered by the United States is that Congress intended to provide for recovery of costs of "technical services" under Section 101(25)'s provision for "enforcement activities." *Id.* In making this argument the United States implicitly concedes that Congress meant "enforcement activities" to *include* attorneys' fees. Further, the United States' proffered *additional* meaning for "enforcement activities"—"technical

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[1]Similarly, the United States implicitly agrees that "enforcement activities" encompasses attorneys' fees within its meaning when it states:

> At the time that amendment [Section 101(25)] was made, there was contemporaneous litigation regarding the government's ability to *recover the costs of attorney time* expended in enforcement activity. . . . [T]hat lack of clarity had the potential to be quite detrimental to the funding of EPA's costly mission under CERCLA. *The amendment neatly resolved that issue* by expressly including 'enforcement activities' within the definition of 'response.'

Respondent's Brief at 22-23 (emphasis added).

services"—is superfluous; CERCLA already provided for recovery of costs of "technical services" *prior* to the amendment of Section 101(25). For example, 42 U.S.C. § 9601(23) provided, and still provides, for recovery of the cost of taking "such actions as may be necessary to monitor, assess, and *evaluate* the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such *other* actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment."[2] Even more clearly, 42 U.S.C. § 9604(b) (emphasis added) ("Section 104(b)"), heavily relied upon by the United States, provides:

> the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and *other* studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.

The phrase "enforcement activities" was not added to CERCLA to assure recovery of "technical services" costs.[3]

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[2]Since CERCLA was enacted in 1980, the term "response" has been defined to mean "remove, removal, remedy, *and* remedial action." Section 101(25) (emphasis added). The 1986 SARA amendment to Section 101(25) did not limit this definition; it expanded it to include "enforcement activities related thereto."

[3]Since CERCLA was enacted in 1980, there has been no challenge to the proposition that "technical services" are recoverable as "response" costs. It is virtually unimaginable that any cleanup could be done without such costs being incurred.

Despite the United States' implicit agreement that attorneys' fees are encompassed by Congress' express provision for recovery of costs of "enforcement activities," the United States argues that this language should not be given effect under *Runyon v. McCrary*, 427 U.S. 160 (1976), and *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). Neither *Runyon* nor *Alyeska* countenance a result that defeats Congress' intent. CERCLA's language may be "inartful," *Exxon Corp. v. Hunt*, 475 U.S. 355, 363 (1986), and may fail to use "magic words," *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13 n.4 (1989), but the Court has previously given effect to Congress' intent, as manifested by CERCLA's language. Neither *Alyeska* nor *Runyon* compel a different result in this case.[4]

In *Alyeska* and *Runyon*, there was no statutory language even remotely suggesting that Congress intended attorneys' fees to be awarded. The United States, without discussion or analysis, simply ignores the differences between the statutory

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[4]The United States continues to argue that the United States is provided, pursuant to Section 104(b)(1)'s provision for the United States to recover its costs of "legal . . . studies," the right to recover its attorneys' fees for bringing a cost-recovery action under Section 107(a). The United States suggests that this language is "adequate" to explicitly provide for its attorneys' fees under *Alyeska* and *Runyon*. Respondent's Brief at 22 n.23. In making this argument, the United States implicitly agrees with Key Tronic's position that "magic words," *Union Gas*, 491 U.S. at 13 n.4, are *not* necessary to conclude under *Alyeska* and *Runyon* that Congress intended attorneys' fees to be awarded.

Key Tronic submits that the United States cannot plausibly contend that recovery of attorneys' fees incurred in litigation under the rubric "legal . . . studies" meets *Runyon* and *Alyeska* but "enforcement activities" does not. If "enforcement activities" encompasses attorneys' fees, as Key Tronic submits, and as the United States implicitly agrees, there is no basis to find it has that meaning for the United States alone.

language at issue in this case and the statutory language construed in *Runyon* and *Alyeska*. In this case, Congress' language providing for the recovery of attorneys' fees, as costs of "enforcement activities," may be inartful, yet even the United States implicitly agrees that Congress intended to include attorneys' fees within the scope of that language. Thus, unlike the statutes at issue in *Runyon* and *Alyeska*, Congress' intent that attorneys' fees be awarded is manifested in Section 101(25)'s express language and that intent must be given effect.[5]

C. ATTORNEYS' FEES ARE NOT LIMITED TO THE UNITED STATES.

At bottom, the United States implicitly argues that Section 101(25) includes attorneys' fees, but that it has that meaning only for the United States. The definition of "response," which provides for attorneys' fees as costs of "enforcement activities," plainly and unambiguously applies

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[5]The United States also argues that "enforcement activities" does not encompass fees in light of CERCLA's citizens suit and "whistleblower" provisions, which provide for an award of "attorney's fees" or "attorney . . . fees." 42 U.S.C. § 9610(c) (whistleblowers); 42 U.S.C. § 9659(f) (citizens suits). These provisions shed no light on the issue before the Court. As discussed in Petitioner's Brief at 26, citizens suit plaintiffs do not incur "response" costs and therefore are ineligible for attorneys' fees as costs of "response." In this light, Congress was required to provide for recovery of "attorney fees" to citizens suit plaintiffs to meet the tests set forth in *Runyon* and *Alyeska*. The United States ignores this distinction between citizens suit plaintiffs and persons such as Key Tronic who are entitled to fees as "response" costs. Likewise, because "whistleblowers" do not incur "response" costs and because the "whistleblower" attorneys' fee provision was contained in CERCLA as originally enacted, the "whistleblower" fee provision sheds no light on whether attorneys' fees are encompassed by the "enforcement activities" language added by SARA in 1986.

to Key Tronic, which sought recovery under Section 107(a)(4)(B) for its costs of "response." Key Tronic submits that this plain meaning controls. The Court should reject the United States' argument that a single term, "enforcement activities," has different meanings in the same statute. *Ratzlaf v. United States*, 114 S. Ct. 655, 660 (1994) (a statutory term, especially a term appearing only once, must be applied "the same way each time it is called into play").

In an attempt to avoid that rule of statutory construction, the United States argues that Congress *did* intend "enforcement activities" to encompass attorneys' fees, but that it intended merely to confirm the United States' preexisting statutory authority to recover fees under Section 104(b)(1). Respondent's Brief at 22-23. This argument is unpersuasive. The courts had already uniformly concluded before the 1986 SARA amendments that the United States had the statutory authority, under Section 104(b)(1), to recover its fees for bringing a Section 107(a) cost-recovery action.[6] The United States thus seems to argue that Congress took the trouble to amend CERCLA in a superfluous manner. *Cf. Kungys v. United States*, 485 U.S. 759, 778 (1988) (statutes should not be construed to render any part superfluous).

To avoid a construction of Section 101(25) that renders it superfluous, the United States contends that Congress acted

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[6]*United States v. Northeastern Pharmaceutical & Chemical Co.*, 579 F. Supp. 823, 851 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 186 (W.D. Mo. 1985); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1009 (D.S.C. 1984), *aff'd in part and vacated in part*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

to amend Section 101(25) in order to resolve "controversy," Respondent's Brief at 8, regarding whether the United States was entitled, pursuant to Section 104(b), to attorneys' fees for bringing a Section 107(a) cost-recovery action.[7] The United States cites three cases to suggest a "controversy" that it claims necessitated congressional action.[8] *Each* of those cases held that Section 104(b) provided authority to award fees to the United States when it brought a Section 107(a) cost-recovery action. *Each* of those cases was decided in 1984 or 1985, well before the 1986 SARA amendments to CERCLA. In the two cases appealed, the opinions are silent on the issue of fees and that issue does not appear to have been raised on appeal. The other case was never appealed. Key Tronic submits that unanimous and unappealed rulings construing Section 104(b)(1) in favor of the United States are hardly evidence of controversy necessitating congressional action.

Even assuming, *arguendo*, that Congress amended Section 101(25) in response to such controversy, Congress responded by amending a definitional section that plainly and unambiguously applies to *all* cost-recovery actions in which a party seeks recovery of "response" costs, including actions brought under Section 107(a)(4)(B). The United States unpersuasively argues that Congress amended a definitional section plainly applying to all persons but that Congress intended to provide attorneys' fees only to the United States. If Congress had so intended, it would have manifested that intent by limiting recoverability of attorneys' fees to the

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[7]As discussed above, the United States implicitly concedes that Congress intended that attorneys' fees be awarded as a cost of "enforcement activities" when making this argument.

[8]The three cases are the same three cited in footnote 6, above.

United States, either by expressly so stating in Section 101(25) or adding the "enforcement activities" language that provides for fees to Section 107(a)(4)(A), which is not a definitional section of general application. Congress did not do so. The plain meaning of the statute controls. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989).

D. PRIVATE PARTIES ENFORCE CERCLA.

Common usage would suggest that when a person brings a cost-recovery action to establish that someone else is liable for cleanup costs under CERCLA, the person is "enforcing" the statute. To avoid the statute's plain meaning, the United States argues that even though the definition of "response" plainly applies to Key Tronic, and even though it implicitly concedes that the "enforcement activities" language of that definition evinces Congress' intent that fees be recovered, that definition does not apply to Key Tronic because it did not "enforce" CERCLA.[9] The United States constructs this

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[9]The United States does not contest that it paid $1.45 million to the EPA as a result of Key Tronic's efforts to enforce CERCLA, including its efforts to enforce CERCLA's liability scheme. Pet. Cert. Appendix B-14 n.4, *Key Tronic Corp. v. United States*, 766 F. Supp. 865, 872 n.4 (E.D. Wash. 1991), *rev'd*, 984 F.2d 1025 (9th Cir.), *cert. granted*, 126 L. Ed. 2d 592 (1993). The United States asserts, however, that Key Tronic began to take steps to enforce CERCLA only "after various neighbors of the site sued petitioner." Respondent's Brief at 2. The United States cites *nothing* in the record for that proposition. There is nothing. To the contrary, the record demonstrates that Key Tronic took steps to clean up the environment and to protect the health of people near the Colbert Landfill immediately after pollution was discovered in 1980, before suit was filed in *Wilson v. Key Tronic Corp.*, 701 P.2d 518 (Wash. Ct. App. 1985). *See, e.g.*, CR 40, Ex. 11, Request for Admission No. 10 (Operator of Landfill, William Schmidt, admits that "Plaintiff Key Tronic has spent money since 1980 to fund a cleanup of the groundwater

argument from its "reading," Respondent's Brief at 15 n.12, that Key Tronic's Section 107(a) cost-recovery action does not further CERCLA's "primary goals." *Id.* at 17. This argument should be rejected.

CERCLA's legislative history is clear:

> CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups.

H.R. Rep. No. 99-253 (III), 99th Cong., 2d Sess. 15 (1985), *reprinted in* 1986 U.S. Code Congressional and Administrative News (U.S.C.C.A.N.) 3038. In accord with this legislative history, the Court has recognized *both* of CERCLA's goals:

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contamination emanating from Colbert Landfill."); CR 40, Ex. 12 (Alumax defendants admit that "Plaintiff Key Tronic has spent money since 1980 investigating whether, and to what extent, hazardous substances have been released into and from the Colbert Landfill."). *Accord* CR 40, Ex. 14, at 94, 97 (trial testimony of Spokane County employee, Mr. Taam, regarding Key Tronic's early cleanup efforts); CR 40, Ex. 17, at 8, *State of Washington v. County of Spokane*, C-89-033-RJM (Consent Decree indicating same).

Key Tronic notes that even had the *Wilson* suit been filed before Key Tronic began to enforce CERCLA, which it was not, it is of no significance because a party's motives in enforcing CERCLA are irrelevant. *General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415, 1418 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991). What matters is what a party actually does, i.e., enforce CERCLA by cleaning up the environment and enforcing CERCLA's liability scheme requiring all polluters to pay.

> Congress did not think it enough, moreover, to permit only the Federal Government to recoup the costs of its own cleanups of hazardous-waste sites; the Government's resources being finite, it could neither pay up front for all necessary cleanups nor undertake many different projects at the same time. Some help was needed, and Congress sought to encourage that help by allowing private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties.

Union Gas, 491 U.S. at 21-22 (plurality opinion).

The United States ignores CERCLA's *twin* goals and simply chooses to designate *one* of those goals as "primary" to suit its argument. Key Tronic submits that there is no basis for claiming that one of CERCLA's goals is "primary" and, presumably, the other "secondary." Even were there a basis to distinguish "primary" and "secondary" goals, which there is not, the United States offers no reason why enforcing a secondary goal is any less of an "enforcement activity" than the enforcement of a "primary" goal.[10]

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[10]Indeed, the United States' argument is undercut by the legislative history it quotes, which states that prior to SARA the "primary responsibilities for cleanup and enforcement are vested in the President." Respondent's Brief at 17 n.14 (quoting H.R. Rep. No. 253, 99th Cong., 2nd Sess., Pt. V, at 5 (1985)). This history implies that *all* persons have a role in "cleanup and enforcement," while the President has a "primary" role. Moreover, it summarizes then-existing law, i.e., the CERCLA law *before* SARA. The Court acknowledged in *Union Gas* that SARA increased the government's reliance on private persons to carry out CERCLA's goals. *Union Gas*, 491 U.S. at 21-22. Thus, far from

The United States, citing *Thunder Basin Coal Co. v. Reich*, 114 S. Ct. 771 (1994), argues that "enforcement" of statutes that provide for regulatory enforcement should be understood to mean enforcement by governmental regulators. Nothing in that case even remotely suggests that private parties who bring suit under an express private right of action do anything other than enforce such a statute. In advancing this argument, unsupported by *Thunder Basin Coal*, the United States ignores the Court's prior decision in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109 (1986). In *Cargill*, the Court stated that an express statutory right of action provides the "vehicle for private enforcement" of the laws. *Id.* (discussing private right of action in context of antitrust laws). *See also Alyeska*, 421 U.S. at 263 (noting that statutes providing for award of fees generally suggest that Congress has "opted to rely heavily on private *enforcement* to implement public policy"). (Emphasis added) The United States has no response to and does not address these authorities.[11]

The United States next cites "numerous" references in CERCLA to forms of the word "enforce" that refer to governmental enforcement. Respondent's Brief at 18-21. In this regard, Key Tronic does not deny, and has never denied, that the United States *also* enforces CERCLA. In any event, the United States' argument that the definitional term

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supporting the United States' argument, this history supports Key Tronic's arguments that it *enforced* CERCLA.

[11]Interestingly, governmental regulators in the Federal Trade Commission also enforce the Sherman Act, 15 U.S.C. § 1 *et seq.*, *see, e.g.*, *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966), the same Act that provides for "private enforcement" pursuant to its private right of action. *Cargill*, 479 U.S. at 109.

"enforcement activities" is limited to governmental regulators fails because the United States concedes that only a "preponderance" of the references supports its argument. Respondent's Brief at 20. Most importantly, the United States concedes that the particular statutory provision at issue, Section 101(25), "could be construed to include activities by [non-governmental] parties." Respondent's Brief at 20. *See also* 42 U.S.C. § 9622(f)(6)(C) (contemplating that "future enforcement action under section 106 or 107 of this title" may be taken by the government or by a private party that settles with the government). Moreover, the United States' statement that "whistleblowers" and citizens suit plaintiffs "enforce" CERCLA, Respondent's Brief at 15 n.12, demonstrates that governmental regulators are not the only enforcers of CERCLA. Like Key Tronic, those persons enforce CERCLA pursuant to the private right of action granted them in the statute. *Cf. Cargill*, 479 U.S. at 109. The United States has no persuasive argument that Key Tronic did not "enforce" CERCLA by carrying out CERCLA's *twin* goals of cleaning up the environment *and* assuring that all persons who pollute must pay for the cleanup.[12]

Last, the United States relies upon a committee report to make two incompatible arguments that Key Tronic did not "enforce" CERCLA. The report provides:

> The section also modifies the definition of "response action" to include related enforcement activities. The change will

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[12]The United States suggests that Key Tronic does not argue that attorneys' fees it expended in negotiating the Consent Decree are recoverable as costs of "enforcement activities." Respondent's Brief at 16 n.13. The United States is mistaken; Key Tronic made exactly that argument in its Opening Brief. *See* Petitioner's Brief at 20.

> confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties.

H.R. Rep. No. 99-253(I), 99th Cong., 2d Sess., pt. 1, at 66-67 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2848-49. On the one hand, the United States seemingly contends that this report demonstrates that Congress actually intended to amend the meaning of "response action," a term used in Section 104(b), but mistakenly amended Section 101(25) instead. Respondent's Brief at 23 n.25, 25 n.28. A casual review of the entire committee report demonstrates, however, that Congress intended to amend the definition of "response," the term in Section 101(25), not "response action," the term used in Section 104(b)(1). *Accord* H.R. Conf. Rep. No. 99-962, 99th Cong., 2d Sess. 185 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3278; H.R. Rep. No. 99-253(V), 99th Cong., 2d Sess., pt. 1, at 5-6 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3129. The United States' argument is thus factually meritless and is contrary to the statute's plain language.

On the other hand, based upon this same committee report, the United States inconsistently argues that Congress *did* intend to amend Section 101(25), but that it intended its amendment of that definitional section to benefit only the United States.[13] Key Tronic submits that the committee report supports the United States' argument, if at all, only by negative inference. Such a negative inference from a single

[13]Key Tronic agrees that Section 101(25), a definitional section, applies to the EPA. A committee report noting this unremarkable fact, however, in no way excludes application of a definitional section to other persons in the statute. *Cf. Ratzlaf*, 114 S. Ct. at 660 (single term should have single meaning throughout statute).

sentence of a committee report is insufficient to overcome Section 101(25)'s plain language, which unambiguously applies to all persons seeking to recover costs of "response." The United States fails to show that application of the statute's plain language produces results demonstrably at odds with Congress' express language. Accordingly, the statute's plain meaning must control. *Ron Pair Enterprises*, 489 U.S. at 242.

Key Tronic submits that the United States' arguments seeking to avoid application of the statute's plain language are unpersuasive and should be rejected. Section 101(25)'s definition of "response" applies to Key Tronic's action against the Air Force and that definition evinces Congress' intent that fees be awarded. The United States does not meet Key Tronic's argument that such a reading of the statute is supported by and furthers CERCLA's underlying policies. Respondent's Brief at 9 n.6 (dismissing Key Tronic's discussion of CERCLA's policy as of "little relevance.").[14] In this regard, Key Tronic has not argued that CERCLA's policy mandates the award of fees. Instead, Key Tronic submits that the interpretation of the statutory language to provide for an award of fees as enforcement activities is completely consistent with and furthers CERCLA's underlying policies.

The argument of the Sand Springs Superfund PRP Group that the award of fees will encourage intransigent litigation

[14]Indeed, while the United States sees these arguments as of "little relevance" when they favor Key Tronic's interpretation, the United States itself offers policy arguments to support its interpretation that Section 104(b)(1) (providing for recovery of "legal . . . studies" costs) provides it with a statutory basis to recover *its* fees under *Runyon* and *Alyeska*. Respondent's Brief at 14-15.

positions is neither persuasive nor well taken. The question before the Court is what Congress intended. In this regard, the "enforcement activities" language manifests Congress' intent that fees be recovered as "response" costs. Moreover, as more than one court has observed, that intent is furthered by providing attorneys' fees to persons who enforce CERCLA's goals. *See Donahey v. Bogle*, 987 F.2d 1250, 1256 (6th Cir.), *cert. denied*, 126 L. Ed. 2d 594 (1993); *General Electric*, 920 F.2d at 1422.[15]

As discussed fully above, Congress manifested its intent that attorneys' fees be awarded as costs of "enforcement activities" to persons who bring suit to recover their "response" costs. That manifest intent is paramount and controls. Accordingly, the Ninth Circuit erred when it failed to give effect to Congress' intent, and its judgment should be reversed.

III. ATTORNEYS' FEES ARE OTHERWISE RECOVERABLE.

Even if the American Rule is held to bar recovery of attorneys' fees expended in the actual cost-recovery litigation, Key Tronic should still be entitled to recover

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[15]Even were there instances where awarding attorneys' fees might conceivably encourage intransigence by a cost-recovery plaintiff, a district court has ample means to address such problems if they arise. For example, under CERCLA, the district court is to award only "necessary" costs of response under Section 107(a)(4)(B). Independent of that control on attorneys' fees, Fed. R. Civ. P. 68 also provides protection to defendants. *See Marek v. Chesny*, 473 U.S. 1, 11 (1985) ("In a case where a rejected settlement offer exceeds the ultimate recovery, the plaintiff—although technically the prevailing party—has not received any monetary benefits from the post-offer services of his attorney.")

nonlitigation attorneys' fees as part of its "response" costs. There is no record support for the United States' contention that nonlitigation fees were incurred by Key Tronic to "criticiz[e] and oppos[e] a remedy proposed by the applicable government agency," and to "resist[] EPA's attempt to enforce the statute." Respondent's Brief at 28. Those factual contentions are insupportable.[16]

The district court found as follows:

> The court finds that the attorneys' fees and executive's opportunity costs in negotiating Key Tronic's consent decree are necessary response costs in cleaning up the Colbert landfill. The court cannot accept the Government's argument that such costs are not recoverable solely because attorneys (as opposed to engineers) carried out work necessary to solving the problems at Colbert. The court further notes that the Government does not contend that these fees are recoverable only as "enforcement activities." Because these expenses were necessary response costs, the

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[16]There is nothing in the record to support these factual statements. As set forth in Petitioner's Statement of Facts, Petitioner's Brief at 2-7, Key Tronic immediately admitted *its* responsibility for pollution at the Colbert Landfill and immediately took steps to address the harm to the environment and to ameliorate health hazards. The United States, on the other hand, did nothing and only belatedly met a portion of its CERCLA obligations, paying $1.45 million toward the cleanup costs in its "de minimis" settlement with the EPA against $4.2 million from Key Tronic, on account of Key Tronic's efforts to enforce CERCLA. Additionally, contrary to the United States' suggestion, Respondent's Brief at 3, Key Tronic objected to the Air Force's settlement with another federal agency, the EPA. CR 23, Ex. 2.

court finds that these costs are recoverable under CERCLA.

Pet. Cert. App. B-14, *Key Tronic*, 766 F. Supp. at 872-73.[17]

CERCLA provides for the recovery of costs incurred "to prevent, minimize, or mitigate damage to the public health or welfare or to the environment." 42 U.S.C. § 9601(23). The *FMC Corp.* conclusion that nonlitigation fees are recoverable costs of response, independent of the American Rule, is supported by the courts' construction of what constitute CERCLA response costs. *See, e.g., General Electric Co.*, 715 F. Supp. 949, 954-55 (W.D. Mo. 1989) (awarding attorneys' fees related to the "administrative" phase of the matter and consultant fees related to preparation of the Remedial Investigation and Feasibility Study and work plan), *aff'd*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991). This case is very similar to *General Electric Co.*. In both cases, the plaintiff took steps to ensure the "prompt cleanup of [a] hazardous waste site" 920 F.2d at 1422. In both cases, the defendant did not "participate[] in any of the investigation, evaluation, or cleanup of the site." *Id.* at 1417.

In short, the *FMC Corp.* rationale for awarding nonlitigation attorneys' fees as costs of response is wholly

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[17]Not only was this issue presented to and decided by the district court, the recoverability of nonlitigation attorneys' fees is also fairly subsumed within the questions presented on petition for writ of certiorari, as well as having been raised before the Ninth Circuit. Brief of Key Tronic Corporation, at 25-28, *Key Tronic Corp. v. United States*, Ninth Circuit No. 91-36021 (filed Mar. 13, 1992). Thus, Key Tronic's recovery of attorneys' fees under the rationale of *FMC Corp. v. Aero Industries, Inc.*, 998 F.2d 842 (10th Cir. 1993), is properly before the Court and a remand is appropriate if the Court adopts the *FMC* reasoning.

consistent with CERCLA's providing for recovery of response costs incurred to investigate contamination and implement cleanups. Key Tronic submits that if litigation attorneys' fees are not recoverable, under the American Rule, that nonlitigation fees are nonetheless recoverable as response costs and a remand for entry of a modified award under the parties' stipulation is appropriate.

IV. CONCLUSION

For the reasons stated, the Court should reverse the judgment of the Ninth Circuit and remand with instructions to (1) reinstate the district court judgment, (2) award fees and costs on appeal, and (3) calculate interest on the district court judgment.

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